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ILLEGAL SUBSTANCE ABUSE AND PROTECTION FROM DISCRIMINATION IN HOUSING AND EMPLOYMENT: REVERSING THE EXCLUSION OF ILLEGAL SUBSTANCE ABUSE AS A DISABILITY

Leslie Francis*

When landlords or employers know that someone is using opioids, either legally or illegally, the consequences can be significant. Rental housing or employment are both critical to well-being, yet may be at particularly high risk. As this Article argues below, legal protections in these areas are inadequate. To summarize the argument briefly, a crucial legal problem for people suffering from substance abuse disorders is that current illegal use of controlled substances is excluded from the definition of disability in federal anti-discrimination statutes. A history of substance abuse is a disability protected from discrimination, but recent relapses vitiate this protection. Relatedly, federal law still criminalizes the medical use of marijuana and federal anti-discrimination law reflects the federal prohibition rather than legalization under state law. The legal use of prescription opioids and medication assisted treatment (MAT) is protected under anti-discrimination law, but many employers subject MAT patients to increased scrutiny and others continue to insist on drug free workplace policies that prohibit their employment.

The statutory exclusions from anti-discrimination law of current illegal use of drugs and the statutory requirements for federally-subsidized housing described below were enacted at the crest of the “war on drugs” during the late 1980s and early 1990s. In 1986, President Reagan signed the Anti-Drug Abuse Act of 1986, which allocated funding for new prisons¹ and created mandatory minimum sentences for drug offenses, including possession.² The Office of National Drug Control Policy was also created in 1988.³ President Bush appointed William Bennett to lead the

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¹ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1451, 100 Stat. 3207, 3207–40 (1986).

² *Id.* § 1052, 100 Stat. at 3207–08.

³ *Office of National Drug Control Policy*, EXECUTIVE OFF. PRESIDENT U.S., <https://www.whitehouse.gov/ondcp/> [<https://perma.cc/K3YN-Z5VL>].

agency as “drug czar” and he pursued an aggressive policy of law enforcement.⁴ This framing of drug use as a serious crime that threatens society by its very existence hovers over anti-discrimination law today.

This Article presents the legal and practical risks to housing and employment for people who use drugs illegally. Housing and employment were selected because of their importance to recovery and overall well-being of people with substance abuse disorders.⁵ The Article then explains how landlords or employers may become aware of illegal substance abuse, despite legal protection for medical records and substance abuse treatment information. It concludes by suggesting that housing and employment anti-discrimination law should shift from frames of condemnation and criminalization to the recognition that substance abuse is a disorder, a shift that could take better account of the needs of people using drugs illegally.

This federal criminalization frame should also be rejected for users of medical marijuana that is legal under the laws of their states. Instead, successful challenges to employers’ adverse actions against MAT patients can point the way forward to reversing the characterization of persons who use substances illegally as criminal threats, rather than as persons with disabilities who should be protected against discrimination. The numbers of affected individuals are not trivial: over twenty million people in the United States are estimated to have substance abuse disorders,⁶ and over three and a half million are estimated to use medical marijuana according to state law.⁷

⁴ Howard Kohn, *Cowboy in the Capital: Drug Czar Bill Bennett*, ROLLING STONE (Nov. 2, 1989), <https://www.rollingstone.com/politics/politics-news/cowboy-in-the-capital-drug-czar-bill-bennett-45472/> [<https://perma.cc/D74K-SS7T>].

⁵ See, e.g., Alexandre B. Laudet & William White, *What Are Your Priorities Right Now? Identifying Service Needs Across Recovery Stages to Inform Service Development*, 38 J. SUBSTANCE ABUSE TREATMENT 51, 55 (2010).

⁶ AM. SOC’Y OF ADDICTION MED., OPIOID ADDICTION 2016 FACTS & FIGURES 1, <https://www.asam.org/docs/default-source/advocacy/opioid-addiction-disease-facts-figures.pdf> [<https://perma.cc/6V9X-3GMW>].

⁷ *Number of Legal Medical Marijuana Patients*, PROCON.ORG, <https://medicalmarijuana.procon.org/view.resource.php?resourceID=005889> [<https://perma.cc/QJR4-STB3>] (last updated May 17, 2018). This figure is an estimated number of users for all 50 U.S. states and D.C., if medical marijuana were legal in all states and D.C., based on a total number of 2.1 million users in 26 out of 29 states and D.C. with legal medical marijuana. At present, thirty-four states have some form of legal marijuana so the numbers are surely far higher than these figures represent. See *State Medical Marijuana Laws*, NAT’L CONF. STATE LEGISLATURES (Mar. 5, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/8GEJ-QZWD>].

I. HOUSING AND ILLEGAL SUBSTANCE ABUSE

For the many in the United States who do not own their own homes,⁸ especially those dependent on subsidies for low-income housing, third-party knowledge of any current illegal use of controlled substances can potentially result in refusals to rent, eviction, or loss of rent subsidies. The argument to follow demonstrates how federal fair housing law provides no protection against these risks. Instead, federal law governing public housing and rental assistance requires lease terms that specifically permit eviction for illegal drug use.

In the same year—1988—that Congress added protection against disability discrimination to the Fair Housing Act (FHA), it specifically tied federal subsidies for housing to lease provisions that permit eviction for illegal drug use by tenants or others living in or visiting the dwelling. These provisions reflect judgments prevalent in the “war on drugs” that drug use by itself is a danger to others and that federal fair housing law should not open the door to people perceived as “addicts.” For example, the House Report explaining the exclusion of current illegal drug use or addiction from the definition of disability in the FHA stated firmly: “This amendment is intended to exclude current abusers and current addicts of illegal drugs from protection under this Act. The definition of handicap is not intended to be used to condone or protect illegal activity.”⁹

A. Federal Fair Housing Act

Title VIII of the Civil Rights Act of 1968 prohibited discrimination in the sale, rental, or financing of housing based on race, color, religion, or national origin.¹⁰ Sex was added as a category protected against discrimination in 1974,¹¹ and family status and disability were added in 1988.¹² In this addition, disability was defined specifically to exclude “current, illegal use of or addiction to a controlled substance.”¹³ Thus, efforts by landlords to evict tenants for illegal drug use or addiction are not barred as disability discrimination in housing.

An ambiguity in this statutory language about what was meant by “current . . . or addiction” created difficulty from the outset. In one medical sense, addiction is a chronic illness; “recovering addicts” are in remission but not “cured.” In another sense, “addiction” refers to the current uncontrolled use of a substance.¹⁴ Programs

⁸ The Census Bureau estimates that 57.2% of all housing units in the U.S. are owner-occupied, while 31% are renter-occupied units. Press Release, U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2018 at 1, 4 (Feb. 28, 2019), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf> [<https://perma.cc/H2XC-NV8G>].

⁹ H.R. REP. NO. 100-711, at 22 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2183.

¹⁰ Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 804–05, 82 Stat. 73, 83–84 (1968).

¹¹ Community Development Act of 1974, 42 U.S.C. § 5309 (1974).

¹² Fair Housing Act Amendments of 1988, 42 U.S.C. § 3605 (1988).

¹³ 42 U.S.C. § 3602(h) (1988).

¹⁴ *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 920 (4th Cir. 1992).

seeking rental housing for persons in recovery challenged refusals to rent to their clients as discriminatory, but were met with the contention that these persons remained “addicts,” despite their participation in the recovery program, and thus were not protected under the FHA definition of disability.

The House Report indicated that the statutory language did not “intend to exclude individuals who have recovered from an addition [sic] or are participating in a treatment program or a self-help group such as Narcotics Anonymous . . . [as] former drug-dependent persons do not pose a threat to a dwelling or its inhabitants simply on the basis of status”¹⁵ This ambiguity was critical to a leading early decision interpreting the statutory language to protect persons in treatment programs that insisted that their clients remain drug-free as a condition of continued participation in the program, but that discharged any client with a positive drug test.¹⁶ Courts have continued to draw this bright line between former and current addiction, despite the medical recognition that people in treatment programs often relapse.¹⁷ For example, in 2012, an Indiana federal court decided a case in which a mother and son were subject to eviction because the mother had been caught with unlawful possession of cocaine, despite her continuing participation in a court-ordered rehabilitation program; the court stated:

It is true that there are safe harbor protections for *past* drug abusers who have successfully completed, or are participating in a supervised drug rehabilitation program . . . it is perfectly permissible for an entity—an employer, a public housing authority etc.—to take an adverse action against someone who is caught using drugs.¹⁸

Importantly, the FHA provides protection for landlords when they act against tenants who present an actual threat or danger to others or to property. The FHA makes explicit that its protections against discrimination do not extend to circumstances in which tenants present a threat to others: “Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.”¹⁹ This

¹⁵ H.R. REP. NO. 100-711, at 22 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2183.

¹⁶ *S. Mgmt. Corp.*, 955 F.2d at 916, 923.

¹⁷ *Drugs, Brains, and Behavior: The Science of Addiction*, NAT’L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/treatment-recovery> [<https://perma.cc/7FSL-5686>] (last updated July 2018) (“The chronic nature of addiction means that for some people *relapse*, or a return to drug use after an attempt to stop, can be part of the process, but newer treatments are designed to help with relapse prevention. Relapse rates for drug use are similar to rates for other chronic medical illnesses . . . Treatment of chronic diseases involves changing deeply rooted behaviors, and relapse doesn’t mean treatment has failed.”).

¹⁸ *A.B. ex rel. Kehoe v. Hous. Auth. of S. Bend*, No. 3:11 CV 163 PPS, 2012 WL 1877740, at *4 (N.D. Ind. May 18, 2012).

¹⁹ 42 U.S.C. § 3604(f)(9) (2018).

provision creates a “direct threat” defense: landlords may refuse to rent to individuals who threaten others by their presence or their activities. It would permit landlords to refuse to rent to people whose drug use creates risks of harm, such as the risks of smoke damage, fire, or contamination from methamphetamine use or manufacture. The provision would further permit landlords to refuse to rent to people whose activities intimidate other tenants, such as might occur with drug dealing or risks of violence.

Without further evidence, however, the defense arguably would not apply in situations in which persons are prescribed medical marijuana for their own use, or even consume opioids illegally behind the closed doors of their own apartments. Indeed—ironically now that physician-prescribed marijuana is to some extent legal in thirty-three states—the House Report for the FHA specifically stated that the drug use exclusion was not meant to cover drugs used under physician supervision: “This exclusion does not eliminate protection for individuals who take drugs defined in the Controlled Substances Act for a medical condition under the care of, or by prescription from, a physician. Use of a medically prescribed drug clearly does not constitute illegal use of a controlled substance.”²⁰

The direct threat provision might also not apply when tenants or their relatives use drugs illegally away from the premises, unless there were some additional reason to believe the off-site use would create risks on the premises. Yet, as described below, tenants in these situations not only are not protected by anti-discrimination law, but also are likely to be subject to eviction from housing and loss of rental assistance when they receive federal low-income rental subsidies.

B. Federal Low-Income Housing Subsidies

In 1937, Congress passed the Housing Act to assist the states in providing “decent, safe, and sanitary dwellings for families of low income, in rural or urban communities”²¹ While the basic structure of the Housing Act has changed in the years since, the purpose of providing decent, safe, and sanitary housing has remained the same.²²

The current makeup of the federally-subsidized housing program is derived from the Housing and Community Development Act (HDCA), enacted in 1974.²³ HDCA amended Section 8 of the original Housing Act of 1937,²⁴ and federally subsidized housing is now widely referred to as “Section 8 Housing.”²⁵ Section 8

²⁰ H.R. REP. NO. 100-711, at 22, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2183.

²¹ Wagner-Steagall Act of 1937, Pub. L. No. 75-412, 50 Stat. 888, 888 (1937).

²² Roberta L. Rubin, *Public Housing Development—Mixed Finance in the Context of Historical Trends*, in *NAVIGATING HUD PROGRAMS, A PRACTICAL GUIDE TO THE LABYRINTH* 232–34 (George Weidenfeller & Julie McGovern eds., 2012).

²³ Housing and Community Development Act of 1974, Pub. L. 93-383, 88 Stat. 633 (codified at 42 U.S.C. § 1437f (2018)).

²⁴ *See id.*

²⁵ *See, e.g., Housing Choice Vouchers Facts Sheet*, HUD.GOV, https://www.hud.gov/topics/housing_choice_voucher_program_section_8 [<https://perma.cc/HQ7N-G2XA>].

Housing is distinguished from the U.S. Department of Housing and Urban Development (HUD)'s traditional public housing program in which the government owns the housing units, inasmuch as Section 8 Housing deals with housing owned by a private landowner.²⁶ Approximately two million residents live in traditional public housing units, which are managed by approximately 3,300 local housing agencies.²⁷ In contrast, approximately 4.7 million residents live in Section 8 Housing.²⁸ More than half of these Section 8 households have a head or a spouse who is an elderly adult or a person with disabilities.²⁹

Two primary programs come under Section 8 Housing: project-based assistance and tenant-based assistance.³⁰ Project-based assistance is based on the specific housing unit.³¹ Tenant-based assistance allocates assistance specific to the tenant and will follow the tenant to whichever housing unit he or she selects.³² In project-based housing, the landlord contracts with a Public Housing Agency (PHA), agrees to set aside a certain number of units for Section 8 Housing, and receives vouchers directly from the PHA.³³ In tenant-based projects, the tenant works directly with the PHA, receives the housing voucher, and can use it on a rental unit that he or she chooses.³⁴ Under either of these programs, the tenant pays a "tenant rent," which is typically thirty percent of his or her adjusted gross income, and the government pays the owner the remaining balance of the rent pursuant to the housing assistance payment contract.³⁵

In 1988, Congress judged that "public housing projects in many areas suffer from rampant drug related crime" and decided to take action against drug use in traditional public housing.³⁶ In Congress's judgment, drug-related crime leads to murders, muggings, and other forms of violence, and also causes the "deterioration of the physical environment that requires governmental expenditures" ³⁷ Moreover, Congress found that the "Federal Government has a duty to provide public housing that is decent, safe, and free from illegal drugs" ³⁸ Therefore,

²⁶ See HUD's Public Housing Program, HUD.GOV, https://www.hud.gov/topics/rental_assistance/phprog [<https://perma.cc/NW6E-XEED>].

²⁷ *Id.*; see also NAT'L CTR. FOR HEALTH IN PUB. HOUS., DEMOGRAPHIC FACTS: RESIDENTS LIVING IN PUBLIC HOUSING 1 (2016) [hereinafter DEMOGRAPHIC REPORT].

²⁸ DEMOGRAPHIC REPORT, *supra* note 27, at 1.

²⁹ Alicia Mazzara & Barbara Sard, *Chart Book: Employment and Earnings for Households Receiving Federal Rental Assistance*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 5, 2018), <https://www.cbpp.org/research/housing/chart-book-employment-and-earnings-for-households-receiving-federal-rental> [<https://perma.cc/ZNV9-DM5V>].

³⁰ HARRY D. MILLER & MARVIN B. STARR, 10 MILLER & STARR, CAL. REAL EST. § 34:265 (4th ed. 2018).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Public Housing Drug Elimination Act of 1988, 42 U.S.C. § 11901 (1988).

³⁷ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4301 (1988).

³⁸ *Id.*

Congress enacted the Anti-Drug Abuse Act (ADAA),³⁹ which requires that each public housing agency under the traditional housing program use a tenant lease that provides that “drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.”⁴⁰ Ten years later, in 1998, Congress imposed similar requirements on Section 8 housing with the passage of the Quality Housing and Work Responsibility Act (QHWRA).⁴¹ The QHWRA required that contracts between a public housing agency and an owner of existing housing units provide that “during the term of the lease . . . any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy[.]”⁴²

Although these lease provisions are mandatory, there may be some discretion in how they are implemented in actual eviction decisions. In 2002, the Supreme Court decided *Rucker v. Davis* wherein four tenants facing eviction from traditional public housing in Oakland, California, challenged their evictions based on the argument that they had no knowledge of or ability to control the behavior of other occupants of the unit.⁴³ Two of the evicted tenants were grandparents whose grandsons, and residents of the unit, had been caught in possession of marijuana in the unit parking lot.⁴⁴ Another eviction involved a resident whose daughter with intellectual disabilities had been found with cocaine and a crack cocaine pipe three blocks away from the unit and whose son (not an apartment resident) had been found with cocaine eight blocks away.⁴⁵ The caregiver of the last of the tenants, a disabled man, had been found with cocaine in the apartment.⁴⁶ The tenants contended that the ADAA did not require eviction of innocent tenants and that, if it did, it was unconstitutional as a violation of a property interest without due process.⁴⁷

In ruling against the *Rucker* tenants, the Court found that the statute “unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members

³⁹ *Id.*

⁴⁰ *Id.* at 4300; *see also* 42 U.S.C. § 1437d(l)(6) (2018) (“[A]ny drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.”).

⁴¹ Quality Housing and Work Responsibility Act, Pub. L. 105-276, 112 Stat. 2461 (1998).

⁴² *Id.* at 2600; *see also* 42 U.S.C. § 1437f(d)(1)(iii) (2018) (“[D]uring the term of the lease . . . any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.”).

⁴³ *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130 (2002).

⁴⁴ *Rucker v. Davis*, No. C 98–00781 CRB, 1998 WL 345403, at *2 (N.D. Cal. June 19, 1998), *rev’d and vacated*, 403 F.3d 627 (9th Cir. 2000).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

and guests whether or not the tenant knew, or should have known, about the activity.”⁴⁸ The Court found that “[r]egardless of knowledge, a tenant who cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.”⁴⁹ Notably, this reasoning assumes that illegal drug use is itself a threat to others; in none of the cases were there allegations that the use in question had actually or potentially resulted in threats or harm to other residents beyond the mere fact of use.⁵⁰ This reasoning followed HUD’s assumptions in requiring the lease terms that drug use is itself a threat and that drug use and drug dealing should be viewed as the same kind of threat.⁵¹ The Court also noted, however, that “[t]he statute does not *require* the eviction of any tenant who violated the lease provision.”⁵² Rather, it entrusts

the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from rampant drug-related or violent crime, the seriousness of the offending action, and the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action.⁵³

Therefore, the agency has discretion to determine whether to pursue an eviction or ejectment action on any particular tenant who violates the drug-provision of the lease.⁵⁴

Although the Supreme Court has not ruled on whether the reasoning in *Rucker* would also apply to the lease terms required for Section 8 subsidies, some federal appellate decisions have upheld evictions for drug use in cases in which there was no showing of danger to other residents beyond the fact of drug use. For example, Lawrence Kelly and his son Michael were evicted from an apartment in Topeka, Kansas, after Michael had been arrested on drug possession charges, even though Michael pled not guilty and was placed on diversion.⁵⁵ In a case involving traditional public housing, Silas Taylor, a resident with hearing and speech impairments, was evicted after convictions of possessing drug paraphernalia, despite the fact that there

⁴⁸ *Rucker*, 535 U.S. at 130.

⁴⁹ *Id.* at 134 (internal quotation marks omitted) (quoting Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560-1, 51,567 (Oct. 11, 1991)).

⁵⁰ *Id.*

⁵¹ Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,563 (Oct. 11, 1991) (discussing that the law provides specifically that a public housing tenancy may be terminated for drug-related and other serious criminal activity by a “guest” of the household. Such criminal activities by drug dealers and other persons who enter at the invitation of household members are a threat to the welfare of project residents and PHA employees).

⁵² Dep’t of Hous. & Urban Dev. v. *Rucker*, 535 U.S. 125, 133–34 (2002).

⁵³ *Id.* at 134 (internal citations omitted).

⁵⁴ *Id.*

⁵⁵ *Kelly v. Topeka Hous. Auth.*, 147 Fed. App’x 723, 724 (10th Cir. 2005).

was no evidence he had actually possessed drugs or distributed them and despite evidence that he was likely to become homeless as a result of the eviction.⁵⁶

Dierdre Lawrence, a tenant who had been convicted of drug dealing, was evicted despite the fact that she had successfully completed a drug rehabilitation program and was likely to become homeless with her three children;⁵⁷ the court wrote explicitly that “Plaintiff’s conduct violated the prohibition on drug-related criminal activity; therefore, it need not also be a threat.”⁵⁸ Florence Tinnin, a 67-year-old woman with disabilities, was evicted and her Section 8 benefits were terminated after a conviction of cocaine possession and an admission that she had sold drugs—despite evidence of her good character, regret, and cessation of any criminal activities.⁵⁹ The hearing office had reached out beyond her authority to recommend that Ms. Tinnin’s benefits be restored, but the court instead blamed her for her bad behavior: “As a member of the Section 8 program, Ms. Tinnin held a spot coveted by many needy and law-abiding White Plains residents To make room for these deserving residents, PHA seeks to evict Section 8 participants who deal drugs.”⁶⁰ Here, the court not only blamed Ms. Tinnin, but used language sounding the theme that it would be unfair for her to continue to benefit from rental subsidies when others were waiting.⁶¹

C. Section 8 Subsidies and Medical Marijuana

Landlord-tenant law and eviction proceedings have standardly been matters of state law in the United States. States may have standards for evictions that are more protective of tenants than the lease provisions required for federal housing subsidies. Thirty-three states have now legalized medical marijuana to at least some extent,⁶² yet marijuana use in any form remains illegal under federal law. Some states also have provisions in their medical marijuana laws that prohibit landlords from discriminating against persons permitted to use medical marijuana, unless the landlord is required to do so by federal law or for federal funding.⁶³

Whether the statutory federal lease requirements preempt these state laws has received varying answers in several court decisions. For example, in *Chateau Foghorn LP v. Hosford*, a Maryland landlord brought an eviction action against a

⁵⁶ Taylor v. Cisneros, 913 F. Supp. 314, 317, 322–23 (D.N.J. 1995).

⁵⁷ Lawrence v. Town of Brookhaven Dep’t of Hous., Cmty. Dev. & Intergovernmental Affairs, No. 07-CV-2243 (JS)(WDW), 2007 WL 4591845, at *24 (E.D.N.Y. Dec. 26, 2007).

⁵⁸ *Id.* at *10.

⁵⁹ Tinnin v. Section 8 Program of White Plains, 706 F. Supp. 2d 401, 402, 408 (S.D.N.Y. 2010).

⁶⁰ *Id.* at 402.

⁶¹ *Id.*

⁶² *State Medical Marijuana Laws*, NAT’L CONF. STATE LEGISLATURES (Feb. 11, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/8GEJ-QZWD>].

⁶³ See, e.g., ARIZ. REV. STAT. § 36-2813(B) (2019); CONN. GEN. STAT. § 21a-408p(b)(2) (2019).

tenant after the tenant was criminally cited for possession of a marijuana plant grown in his apartment.⁶⁴ The disabled tenant, who experienced muscle spasms and pain, had grown the plant for his own medical use.⁶⁵ At the time, possession of the amount of marijuana in question was a criminal offense under Maryland law, although the statute permitting medical marijuana in Maryland became effective four months later.⁶⁶ The plant's presence came to light when exterminators treating all units in the complex observed it; the tenant was charged with possession of marijuana, charges that were ultimately not prosecuted.⁶⁷ Nonetheless, based on the citation, the landlord brought an eviction action against the tenant, citing the required Section 8 lease provision.⁶⁸ The trial court granted summary judgment and restitution of possession to the landlord on the basis that marijuana possession was against the Maryland law in effect at the time and against federal law.⁶⁹ The court also reasoned that the jury was entitled to credit the landlord's discretion in evicting the tenant by analogizing *Rucker* to landlords of Section 8 tenants, but that the provisions of state law were preempted.⁷⁰

The Court of Special Appeals reversed, holding that the Maryland law requiring a "substantial" breach of the terms of the lease for eviction was not preempted.⁷¹ In thus concluding, the Court of Special Appeals reasoned that in areas of law traditionally for the states, such as landlord-tenant law, state law is only preempted if enforcing it would cause major damage to substantial interests embedded in any conflicting federal laws.⁷² The Maryland Court of Appeals agreed that landlord-tenant law is a traditional domain of the states and that, on a heightened presumption against preemption, the Maryland law of evictions did not conflict with Congress's intent in mandating the lease provision.⁷³ Therefore, because Maryland requires a breach of a lease to be "substantial and warrants an eviction," a court is allowed to deny an eviction even if a tenant commits a drug-related crime if the breach of the lease is not substantial.⁷⁴

Hosford may be a decision that is unusually sympathetic to tenants using medical marijuana, however. In January 2019, the Maine Supreme Judicial Court upheld an eviction for possession and use of medical marijuana in federally funded affordable housing.⁷⁵ The eviction notice cited the tenant not only for unlawfully growing marijuana, but also for refusing access to the bedroom where the marijuana was growing, installing a lock on the room without permission, threatening property

⁶⁴ Chateau Foghorn LP v. Hosford, 168 A.3d 824, 828 (Md. 2017).

⁶⁵ *Id.* at 830.

⁶⁶ *Id.* at 830–31.

⁶⁷ *Id.* at 828.

⁶⁸ *Id.* at 829.

⁶⁹ *Id.* at 830.

⁷⁰ *Id.* at 831.

⁷¹ *Id.* at 832–33.

⁷² *Id.* at 833.

⁷³ *Id.* at 835.

⁷⁴ *Id.*

⁷⁵ *Id.* at 835–36.

staff who sought to enter the bedroom, and smoking marijuana in the apartment in violation of a no smoking policy.⁷⁶ The trial court's "most important finding" was that the tenant had possessed marijuana in violation of the lease and federal law.⁷⁷ In denying the tenant's appeal, the Maine Supreme Judicial Court relied on additional violations of the lease: the refusal to allow the landlord to enter the apartment for inspection, the installment of the lock without permission, and the effort to intimidate staff from entering the room.⁷⁸ Arguably, however, these additional violations were in response to the tenant's fears that discovery of the marijuana would result in his eviction.⁷⁹ To take another example, an intermediate appellate court in Washington state has also upheld an eviction for violation of the anti-drug policy in Section 8 housing.⁸⁰

Federal court decisions also conclude that federal law preempts state medical marijuana laws. For example, a Michigan tenant in Section 8 housing sought to use physician-prescribed medical marijuana pursuant to Michigan's Medical Marijuana Act to alleviate the symptoms of her multiple sclerosis faced this problem.⁸¹ She was told in a declarative judgment, in favor of the landlord, that she was not entitled to use medical marijuana as a reasonable accommodation for her disability under the Fair Housing Act.⁸² Evidence indicates that many Section 8 Housing tenants are routinely prohibited from using medical marijuana.⁸³ As noted by the trial court in *Hosford*, landlords and PHAs may still use a tenant's possession of marijuana, even for medical purposes, as grounds for eviction.⁸⁴

Federal policies in effect in 2019 also favor enforcement of the federal prohibitions over state law. In 2011, HUD offered a memorandum to PHAs that instructed them to deny all Section 8 Housing applicants if they use marijuana for

⁷⁶ *Sherwood Assocs. LP v. Jackson*, 200 A.3d 1259, 1261–62 (Me. 2019).

⁷⁷ *Id.* at 1262–63.

⁷⁸ *Id.* at 1264. The tenant had posted a sign on the bedroom that read: "No one may enter this room! [. . .] Trespassers will be shot! Survivors shot again!" *Id.*

⁷⁹ *Id.*

⁸⁰ *Anacortes Hous. Auth. v. Assenberg*, No. 58716–1–I, 2007 WL 3348459, at *4 (Wash. Ct. App. Nov. 13, 2007). Violation of the apartment pet policy was a second ground for the eviction, although the tenant claimed his snakes were therapy animals. *Id.* at *3

⁸¹ *Forest City Residential Mgmt., Inc. v. Beasley*, 71 F. Supp. 3d 715, 721 (E.D. Mich. 2014).

⁸² *Id.* at 732.

⁸³ See, e.g., Sarah Simmons, *Comment: Medical Marijuana Use in Federally Subsidized Housing: The Argument for Overcoming Federal Preemption*, 48 U. BALT. L. REV. 117, 123–25 (2018); Geoffrey Marshall, *Medical Marijuana Users Are Being Shut Out of Public Housing*, AM. FOR SAFE ACCESS (Sept. 14, 2018), https://www.safeaccessnow.org/medical_marijuana_users_are_being_shut_out_of_public_housing [<https://perma.cc/5BRV-Z6GA>].

⁸⁴ *Chateau Foghorn LP v. Hosford*, 168 A.3d 824, 831 (Md. 2017); see also *Assenberg*, 2007 WL 3348459, at *4 (finding an eviction based on tenant's medical marijuana possession was appropriate).

any reason.⁸⁵ In 2014, under President Obama's administration, another memo instructed landlords and PHAs that under the QHWRRA they must continue to deny admission to all applicants using medical marijuana, must establish policies that allow the termination of tenancy of households with members using medical marijuana, but have discretion about terminating tenancy in these latter situations.⁸⁶ In early 2018, then Attorney General Jeff Sessions sent a memorandum to all U.S. Attorneys rescinding any earlier guidance to federal prosecutors that had deprioritized prosecutions for marijuana activities in accord with state law.⁸⁷ In 2018, Congresswoman Eleanor Holmes Norton from the District of Columbia, introduced a bill to Congress that would disallow any PHA or Section 8 landlord from including lease provisions that prohibit the use of marijuana in accordance with state law,⁸⁸ but the legislation had not progressed as of this writing.

II. EMPLOYMENT AND ILLEGAL SUBSTANCE ABUSE

The ADA prohibits discrimination on the basis of disability in employment, public services, and public accommodations. To the extent that housing or housing subsidies are public services⁸⁹ or public accommodations,⁹⁰ they are covered by the ADA in addition to federal housing law. Like the FHA, the ADA defines disability specifically to exclude current illegal use of controlled substances.⁹¹ With enactment of the ADA in 1990, the definition of disability in the Rehabilitation Act was also amended to incorporate this exclusion.⁹² Unlike the FHA, however, the ADA specifically removes any ambiguity about what is meant by "current addiction":

⁸⁵ Memorandum from Sandra B. Henriquex, Assistant Sec'y for Pub. & Indian Hous. to the U.S. Dep't of Hous. & Urban Dev., Medical Marijuana Use in Public Housing and Housing Choice Voucher Programs (Feb. 10, 2011), <https://www.hud.gov/sites/documents/MED-MARIJUANA.PDF> [<https://perma.cc/FG8N-BMFB>].

⁸⁶ Memorandum from Benjamin T. Metcalf, Deputy Assistant Sec'y for Multifamily Hous. Programs to the U.S. Dep't of Hous. & Urban Dev., Use of Marijuana in Multifamily Assisted Properties (Dec. 29, 2014), <https://www.hud.gov/sites/documents/USEOFMARIJINMFASSISTPROPTY.PDF> [<https://perma.cc/9WB8-6RKD>].

⁸⁷ Memorandum from Jefferson B. Sessions, Attorney Gen. to all U.S. Attorneys, Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/6W72-QTYM>].

⁸⁸ Press Release, Eleanor Holmes Norton, Norton Introduces Bill to Permit Marijuana Use in Public Housing (June 19, 2008) <https://norton.house.gov/media-center/press-releases/norton-introduces-bill-to-permit-marijuana-use-in-public-housing> [<https://perma.cc/UR76-LT7K>].

⁸⁹ The public services provision of the ADA includes state and local governments and any of their agencies or instrumentalities. 42 U.S.C. § 12131(1)(A)–(B) (2018). The Rehabilitation Act, which works in tandem with the ADA, prohibits disability discrimination in federally funded programs. Rehabilitation Act of 1973, 29 U.S.C. § 701 (2018).

⁹⁰ 42 U.S.C. § 12181(7)(A) (2018).

⁹¹ *Id.* § 12210(a).

⁹² H.R. REP. NO. 101-596, at 93 (1993).

[N]othing in . . . this section shall be construed to exclude as an individual with a disability an individual who (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use.⁹³

As with housing, persons who relapse during treatment lose any protection under this provision. Moreover, former employees may be unprotected as well; the Supreme Court has held that dismissal for prior misconduct, including illegal drug use, is a legitimate non-discriminatory reason for an employer to refuse to rehire a prospective employee who has successfully completed treatment for a substance abuse disorder.⁹⁴

Apart from this exclusion from the definition of disability, the ADA protects employers from problems associated with drug use by their employees in a number of important ways. Employees must be “qualified” to perform essential functions of the jobs they seek,⁹⁵ and employers are given considerable deference in deciding what those essential functions are.⁹⁶ Although it is discrimination to fail to provide reasonable accommodations that enable employees to perform essential job functions,⁹⁷ even legal drug use may not be considered a reasonable accommodation if there are grounds for concerns about performance or safety.

In addition, like the FHA, the ADA provides a direct threat defense for employers. The ADA states specifically that “qualification standards” for employment “may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”⁹⁸ Although the statutory language refers “to other individuals,” the Supreme Court has held that threats to self are also covered by the direct threat defense.⁹⁹ Public services may be limited to “qualified” individuals with a disability who “meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the public entity.”¹⁰⁰ Although “essential eligibility requirements” are not defined in the statute, the implementing regulations include a direct threat defense.¹⁰¹ The public accommodations provisions of the ADA also specifically provide that:

⁹³ 42 U.S.C. § 12210(b)(1)–(2) (2018). The court in *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 923 (4th Cir. 1992) relied specifically on this provision in its interpretation of “current addiction.”

⁹⁴ *Raytheon Co. v. Hernandez*, 540 U.S. 44, 54 (2003).

⁹⁵ 42 U.S.C. § 12112(a) (2018).

⁹⁶ *Id.* § 12111(8).

⁹⁷ *Id.* § 12112(b)(5)(A).

⁹⁸ *Id.* § 12113(b).

⁹⁹ *Chevron v. Echazabal*, 536 U.S. 73, 74 (2002).

¹⁰⁰ 42 U.S.C. § 12131(2) (2018).

¹⁰¹ 28 C.F.R. § 35.139(a) (2018).

Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.¹⁰²

The exclusion of current illegal drug use from the ADA definition of disability poses significant problems for employees challenging adverse employment actions resulting from knowledge of their substance use. Employees who have not been in treatment for very long or who relapse during treatment frequently fall within this exclusion, as will be discussed below. Employees who use medical marijuana as legally prescribed in their state are also within the exclusion. By contrast, while employees successfully undergoing MAT frequently confront adverse action from their employers, they can claim the protections of the ADA. How these protections work are helpful illustrations for how reversing the exclusion of illegal drug use from the definition of disability might work in practice.

A. Employees Beginning Treatment

The exclusion of “current” users of illegal drugs from ADA protections has frequently encompassed employees seeking or beginning treatment. Employees who self-report problems in order to get help may face adverse action but be unable to claim any ADA protections. In a leading case, a pharmacist who realized he should not come to work because he was in an impaired state reported his condition and requested leave under the Family and Medical Leave Act (FLMA) to undergo treatment.¹⁰³ Instead of being granted the leave, he was terminated.¹⁰⁴ In the pharmacist’s subsequent ADA suit after successful rehabilitation treatment, the court granted the employer summary judgment because the pharmacist had been a current user of illegal drugs when the employer terminated him, and because as a cocaine user at the time, he was not qualified to work as a pharmacist.¹⁰⁵ In this case, there was no evidence that the pharmacist had ever been impaired on the job, although at one earlier point he had been placed on probation, which he had completed successfully.¹⁰⁶ Cases such as this one are counter-productive; they may discourage individuals from seeking treatment out of concern for their jobs. Individuals who struggle along without treatment may also face excessive

¹⁰² 42 U.S.C. § 12182(3) (2018).

¹⁰³ *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 851 (5th Cir. 1999).

¹⁰⁴ *Id.* at 852.

¹⁰⁵ *Id.* at 853.

¹⁰⁶ *Id.* at 851.

absenteeism or lapses in performance that provide independent justification for adverse employment action but that might have been avoided with earlier treatment.

Courts also have found it difficult to decide how long an employee must be in treatment to be considered no longer a “current” drug user. According to one case, it may be “weeks (or even months).”¹⁰⁷ Refusing to set a bright line (is a month not enough?), courts have been unclear about whether the problem is the recency of the drug use, the reasonableness of the employer’s belief that the employee may still be using drugs, or the employer’s reliance on judgments that the employee’s prognosis is poor. For example, a sales representative who had entered an outpatient drug rehabilitation program tested positive for drugs; he was fired by his employer but told he could return if he “could get clean.”¹⁰⁸ He completed inpatient rehabilitation with a “guarded” prognosis and was offered re-employment, but at reduced duties and compensation, which he refused.¹⁰⁹ The court, in upholding summary judgment for the employer, stated that there was no bright line for current drug use but that the drug use must have “occurred recently enough to indicate that the individual is actively engaged in such conduct”;¹¹⁰ that the drug use must be “sufficiently recent to justify the employer’s reasonable belief that the drug abuse remained an ongoing problem”;¹¹¹ and that factors that may be considered include “the severity of the employee’s addiction and the relapse rates for whatever drugs were used.”¹¹²

A contrasting approach to considering whether adverse action against an employee with a substance abuse disorder looks to the employee’s ability to perform job functions, rather than length of sobriety. In a case involving a telephone maintainer for a commuter railroad, the court said:

For an employer to assume that simply because of a handicap an individual is unable to function in a given employment context stereotypes that person, seeing him, as it were, through a glass, darkly. . . . [and] effects the discrimination forbidden At the same time nothing in the statute prevents an employer from making a decision based on the job-related attributes of a person’s handicap.¹¹³

B. Employees Undergoing Treatment But Relapsing

Employees who relapse while they are undergoing treatment may also be considered “current” drug users and thus lose protection against disability discrimination.¹¹⁴ Many of the reported cases involving relapsing employees or

¹⁰⁷ Shirley v. Precision Castparts Corp., 726 F.3d 675, 679 (5th Cir. 2013).

¹⁰⁸ Mauerhan v. Wagner Corp., 649 F.3d 1180, 1183 (10th Cir. 2011).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1186 (quoting 29 C.F.R. § 1630.3).

¹¹¹ *Id.* at 1187 (quoting *Zenor*, 176 F.3d at 856).

¹¹² *Id.* at 1188 (citation omitted).

¹¹³ *Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511, 513 (2d Cir. 1991).

¹¹⁴ U.S. DEP’T OF HEALTH & HUMAN SERVS. OFFICE FOR CIVIL RIGHTS, FACT SHEET: DRUG ADDICTION AND FEDERAL DISABILITY RIGHTS LAWS 1 (Oct. 25, 2018),

employees whose participation in rehabilitation programs is erratic involve positions where there are risks to others, such as health care or transportation. In these situations, it is not discrimination based on disability to refuse to reinstitute employees whose current use or risk of drug use poses problems of fitness for duty. The decisions are based on whether the employee is qualified for the job¹¹⁵ and whether the employee poses a direct threat to themselves or others.

C. Employees Using Medical Marijuana

As noted above, thirty-three states now allow medical marijuana in at least some form. Some of these statutes include state law non-discrimination provisions.¹¹⁶ Other states allow employers to impose drug-free workplace policies and dismiss employees for failing random drug tests.¹¹⁷ Oregon has held that the federal ADA exclusion of illegal substance use preempts requests for accommodation of off-duty use of medical marijuana under state law.¹¹⁸ Several decisions have refused ADA protections for employees who use medical marijuana in compliance with the laws of their states. For example, the decision to terminate a Colorado truck driver who used medical marijuana off-the-job to treat back pain was upheld.¹¹⁹ A Michigan nursing administrator at an assisted living facility was denied ADA protection after she was fired when a drug test revealed that she used medical marijuana for her epilepsy.¹²⁰

On the other hand, in a case not involving an ADA claim, a Walmart customer service supervisor successfully contended that she had been wrongfully discriminated against under Arizona's law protecting employees with medical marijuana cards from discrimination.¹²¹ Massachusetts has also held that employees

<https://www.hhs.gov/sites/default/files/drug-addiction-aand-federal-disability-rights-laws-fact-sheet.pdf> [<https://perma.cc/9BKC-VNMV>] [hereinafter FACT SHEET].

¹¹⁵ See, e.g., *Smith v. Union Pac. R.R.*, No. 11-cv-986, 2018 WL 1293228, at *3 (N.D. Ill. Mar. 13, 2018) (holding that a locomotive engineer with continuing substance abuse problems posed safety risk); *Herbst v. CSX Transp., Inc.*, No. 1:17-CV-18-TLS, 2019 WL 438070, at *4 (N.D. Ind. Feb. 4, 2019) (concluding that a locomotive engineer is a safety sensitive position).

¹¹⁶ See, e.g., ARIZ. REV. STAT. § 36-2813 (2019); CONN. GEN. STAT. § 21a-408p(b)(3) (2019), DEL. CODE ANN. TIT. 16 § 4905A(a)(3) (2019).

¹¹⁷ See, e.g., N.C. GEN. STAT. §§ 95-230 to -239 (2019); S.C. CODE ANN. §§ 38-73-500, 41-1-15 (2019); UTAH CODE ANN. §§ 34-38-1 to -15 (2019).

¹¹⁸ *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d 518, 536 (Or. 2010). But see *Noffsinger v. SSCNiantic Operating Co. LLC*, 273 F.Supp. 3d 326 (D. Conn. 2017) (concluding that Connecticut prohibition of employment discrimination against authorized users of medical marijuana is not preempted).

¹¹⁹ *Steele v. Stallion Rockies Ltd.*, 106 F. Supp. 3d 1205, 1213 (D. Colo. 2015).

¹²⁰ *E.E.O.C. v. Pines of Clarkston*, No. 13-CV-14076, 2015 WL 1951945, *1 (E.D. Mich. Apr. 29, 2015) (discussing whether an employee was terminated due to her epilepsy or due to her use of medical marijuana).

¹²¹ *Whitmire v. Wal-Mart Stores Inc.*, No. CV-17-08108-PCT-JAT, 2019 WL 479842, at *27 (D. Ariz. Feb. 7, 2019).

may assert a civil action for disability discrimination when they are fired for testing positive for marijuana to treat Crohn's disease.¹²²

This is an emerging area in which the law is unclear; removal of the exclusion of illegal substance use from the definition of disability might return attention in these cases to whether the employee was a person with a disability who was capable of performing essential job functions with or without accommodations.

III. EMPLOYEES USING MEDICATION ASSISTED TREATMENT (MAT)

MAT is legal use of controlled substances, such as methadone or suboxone, in combination with other therapies to suppress cravings and block the euphoria associated with opioid use.¹²³ Because people being treated with MAT are not using substances illegally, they thus do not fall under the exclusion from the definition of disability.¹²⁴ However, as this section describes, employees undergoing MAT continue to face adverse employment actions based on their use of MAT. Some of these employees, joined by the EEOC on their behalf, have challenged these policies as disability discrimination. These cases illustrate how employees may successfully claim the protections of the ADA that require individualized assessments of their ability to perform essential job functions. They also illustrate how employers may be protected from employees who function inadequately or pose safety risks.

Since the ADA Amendments Act of 2008 (ADAAA), claims of disability required for protection from discrimination are to be construed "in favor of broad coverage."¹²⁵ Disability determinations also are not to take mitigating measures into account;¹²⁶ someone undergoing MAT would be assessed for whether their addiction without the treatment would substantially affect a major life activity. Determination of whether someone is a person with a disability requires an individualized inquiry, so the question for anyone using MAT would be whether without MAT they would be substantially limited in a major life activity.¹²⁷ Since the ADAAA, employees have been more likely to succeed in establishing that they qualify as disabled and thus can claim the protections of the statute.¹²⁸

¹²² *Barbuto v. Advantage Salts and Mktg., LLC*, 78 N.E.3d 37, 40 (Mass. 2017).

¹²³ *Medication-Assisted Treatment (MAT)*, SUBSTANCE ABUSE & MENTAL HEALTH ADMIN., <https://www.samhsa.gov/medication-assisted-treatment> [<https://perma.cc/SA28-B5T9>].

¹²⁴ See FACT SHEET, *supra* note 114, at 2.

¹²⁵ 42 U.S.C. § 12102(4)(A) (2018).

¹²⁶ *Id.* § 12102(4)(E).

¹²⁷ See, e.g., *Lopreato v. Select Specialty Hosp.-N. Kentucky, LLC*, No. 12-217-DLB-JGW, 2014 WL 6804221, at *6-7 (E.D. Ky. Dec. 3, 2014). Employees may also claim that they are regarded as disabled; if so, they come within the statutory protections of the ADA but are not entitled to accommodations. See 42 U.S.C. § 12201(h) (2018).

¹²⁸ See, e.g., Stephen E. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2057-58 (2013); Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 720 (2014).

The likely problem for patients using MAT is that employers will refuse to hire them, claiming that they are not qualified because of the medications they take. The EEOC has pursued a number of these cases of blanket refusals to employ persons using MAT. For example, the EEOC recently filed a complaint against Steel Painters for firing a journeyman painter after they learned he was on methadone treatment.¹²⁹ The EEOC has sued Norfolk Southern Railway for their qualification standard that barred anyone on MAT from certain positions without the required individualized analysis of whether they could perform the jobs safely with or without accommodations.¹³⁰

Persons using MAT may also meet with the claim that they present a direct threat to health or safety. For example, a copper fabricating company rescinded a job offer to a production laborer on MAT with methadone.¹³¹ Their claim was that the position involved safety sensitive work, which he could not perform safely while on MAT.¹³² The employer relied on an expert who had not examined the employee or consulted with his MAT physician.¹³³ The court refused to grant summary judgment to the employer because there was a triable issue of fact on whether an individualized assessment would show that the employee posed a threat to himself or others.¹³⁴ The direct threat defense requirement of an individualized assessment had not been met by the employer.¹³⁵ The case later went to trial, and the employer agreed to pay \$85,000 in a private settlement.¹³⁶

¹²⁹ Complaint at 4–5, *E.E.O.C. v. Steel Painters, LLC*, No. 1:18-cv-00303 (E.D. Tex. June 28, 2018).

¹³⁰ *E.E.O.C. v. Norfolk S. Corp.*, No. 2:17-cv-01251-CRE, 2018 WL 4334615, at *2 (W.D. Pa. Sept. 11, 2018); *see also* *Lewis v. U.S. Steel Corp. Fairfield Works*, No. 2:14-cv-01965-AKK, 2016 WL 7373733, at *9–13 (N.D. Ala. Dec. 20, 2016) (recognizing that employers must provide “objective, individualized” evidence that an individual with disabilities is a direct threat to the health or safety of others in the workplace before the employer may remove the individual from the employee’s duties).

¹³¹ *See E.E.O.C. v. Hussey Copper Ltd.*, 696 F. Supp. 2d 505, 510–11 (W.D. Pa. 2010).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 521.

¹³⁵ *Id.*

¹³⁶ Dori Meinert, *Company Settles Methadone Treatment Case*, SOC’Y FOR HUM. RESOURCE MGMT. (Feb. 22, 2011), <https://www.shrm.org/hr-today/news/hr-magazine/pages/methadonetreatment.aspx> [<https://perma.cc/V29D-NTPY>].

These cases illustrate the importance of ADA protections for employees using MAT. Employees are able to insist on individualized assessment of whether they are disabled, whether they are qualified to perform essential job functions with or without accommodations, and whether they pose any actual danger. Stereotypes such as that they are addicts, are untrustworthy, or should “get cleaned up” cannot be applied to them.¹³⁷

IV. PROTECTIONS FOR INFORMATION ABOUT SUBSTANCE ABUSE OR TREATMENT

Medical records of individuals undergoing treatment for substance abuse are stringently protected. These protections were designed to encourage people to seek treatment for their conditions. Unfortunately, however, landlords and employers have many other fully legal ways to learn about substance abuse, especially but not only, when the abuse involves actions that are illegal.

Regulations adopted under the Health Insurance Portability and Accountability Act (HIPAA) protect the privacy and security of identifiable medical records possessed by covered entities. With very few exceptions, all health care providers in the United States today are HIPAA-covered entities, as they maintain at least some records in electronic form¹³⁸ for billing purposes.¹³⁹ Employers may request that employees provide copies of medical records to support claims for accommodations that will enable them to perform essential job functions.¹⁴⁰ Employers may also request records to substantiate applications for leave under FLMA.¹⁴¹ Health care providers may only comply with these requests, however, if the employee signs an appropriate authorization.¹⁴²

In addition to these general protections for medical records, the Substance Abuse and Mental Health Treatment Act (SAMHSA) regulations afford particularly strong safeguards for substance abuse treatment records. The purpose of these “part 2” regulations is explicitly to “ensure that a patient receiving treatment for a substance use disorder in a part 2 program is not made more vulnerable by reason of the availability of their patient record than an individual with a substance use

¹³⁷ See, e.g., *Clipse v. Commercial Driver Servs., Inc.*, 358 P.3d 464, 474 (Wash. App. 2015) (applying Washington state anti-discrimination law).

¹³⁸ 45 C.F.R. § 160.103 (2018).

¹³⁹ The most relevant likely exception may be some psychoanalysts whose patients do not rely on insurance for payment. See Graham L. Spruiell, *Boundary Violations by Third Parties*, 47 AM. PSYCHOANALYST 1, 25 (2013), <http://www.apsa.org/sites/default/files/TAP%202013%20vol47no1.pdf> [<https://perma.cc/27U4-H8YC>].

¹⁴⁰ U.S. EQUAL EMP'T OPPORTUNITY COMM'N, PROCEDURES FOR PROVIDING REASONABLE ACCOMMODATION FOR INDIVIDUALS WITH DISABILITIES, https://www.eeoc.gov/eeoc/internal/reasonable_accommodation.cfm#_Toc531079193 [<https://perma.cc/GH M7-RXLR>].

¹⁴¹ U.S. DEP'T OF LABOR, WAGE & HOUR DIV., THE EMPLOYER'S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT 28 (2018), https://www.dol.gov/whd/fmla/employer_guide.pdf [<https://perma.cc/8K8Q-96NN>].

¹⁴² 45 C.F.R. § 164.508(a) (2018).

disorder who does not seek treatment.”¹⁴³ The part 2 regulations apply to treatment received in any substance abuse treatment facility receiving federal assistance.¹⁴⁴ They require specific written consent for any disclosure outside of the treatment relationship.¹⁴⁵ Thus, if a substance abuse treatment record is transferred to another provider, any subsequent disclosure of the substance abuse treatment information also requires specific written consent. Moreover, these restrictions on disclosure apply to any information that might identify a patient as having a substance abuse disorder, whether directly or indirectly through linkage to other available information.¹⁴⁶

These stringent protections do not apply to information outside of their scope, however, and both landlords and employers may learn about substance abuse in many ways other than through health records.

A. Landlords’ Access to Information About Illegal Substance Abuse

Landlords pursue a number of methods to investigate whether tenants receiving federal rental subsidies may be engaging in illegal drug use. These methods may detect drug use that has no apparent consequences for others, that did not occur in public, and that was not a source of complaints from other residents. For example, subsidized housing units may be searched for health or safety reasons.¹⁴⁷ These searches may be aimed to detect the presence of drugs and include police and drug-sniffing dogs. Residents have argued that these searches require warrants, absent exigent circumstances or resident consent.¹⁴⁸ Resident consent may be express or implied from the circumstances but may not be coerced.¹⁴⁹

Landlords may require drug screening as a condition for approving rentals to Section 8 tenants,¹⁵⁰ and they may also conduct background checks. These are subject to the requirements of the Fair Credit Reporting Act, which include the applicants’ written permission and notice of any adverse action.¹⁵¹ However, potential tenants will learn only after the fact that they have been turned down for an apartment because of the information in a credit report, and this is likely to be too late to provide them with realistic protection. Various state laws may also protect tenants from adverse actions based on information in credit reports.

¹⁴³ 42 C.F.R. § 2.2(b)(2) (2018).

¹⁴⁴ *Id.* § 2.12(b).

¹⁴⁵ *Id.* § 2.31(a).

¹⁴⁶ *Id.* § 2.12(a)(i).

¹⁴⁷ See *Gutierrez v. City of East Chicago*, No. 2:16-CV-111-JVB-PRC, 2016 WL 5819818, at *4 (N.D. Ind. Sept. 6, 2016).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., *Peery v. Chicago Hous. Auth.*, No. 13-CV-5819, 2014 WL 4913565, *6 (N.D. Ill. Sept. 30, 2014), *aff’d*, 791 F.3d 788 (7th Cir. 2015).

¹⁵¹ *Using Consumer Reports: What Landlords Need to Know*, FED. TRADE COMM’N (Oct. 2016), <https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-landlords-need-know> [<https://perma.cc/792Q-GXN2>].

A currently contested question about the extent to which tenants are protected is whether an arrest or an indictment is sufficient evidence to warrant eviction. To illustrate, in one case ongoing as of this writing, the appellate court held that two indictments on charges of drug dealing were insufficient to reach the due process standard of proof required for termination of benefits.¹⁵² This decision will be heard *en banc* by the Eleventh Circuit.¹⁵³

The federal regulations provide that a PHA may use the tenant's criminal record if the tenant is given notice, a copy of the criminal record, and an opportunity to respond to the accuracy of the record.¹⁵⁴ Under President Obama, HUD offered guidance to PHAs instructing them that they should not use tenants' arrest records of drug possession as the sole grounds for evicting tenants from federally provided affordable housing.¹⁵⁵ Rather, the guidance provided that "[t]he conduct, not the arrest, is what is relevant for admissions and tenancy decisions."¹⁵⁶

This HUD guidance was invoked when cross motions for summary judgment were denied by a New York state district court in a drug related eviction proceeding in a public housing project. The motions were denied because a mere arrest and guilty plea to attempted criminal possession of controlled substance is not a conclusive basis to evict under the federally mandated lease provision.¹⁵⁷ While the arrest was insufficient grounds to evict the tenant, the court held the facts warranted a hearing to determine whether the tenant did in fact possess drugs in breach of the lease agreement¹⁵⁸—so the arrest got the eviction process started.

B. Employers' Access to Information About Illegal Substance Abuse

The ADA circumscribes permitted medical examinations carefully. No medical examinations or inquiries are permissible at the pre-employment stage, except for inquiries about an applicant's ability to perform essential job functions.¹⁵⁹ After an employer makes an offer, it may require medical examinations of all entering

¹⁵² See *Yarbrough v. Decatur Hous. Auth.*, 905 F.3d 1222, 1225 (11th Cir. 2018), *reh'g granted*, 914 F.3d 1290 (11th Cir. 2019).

¹⁵³ *Id.*

¹⁵⁴ 24 C.F.R. § 982.553(d)(2) (2019).

¹⁵⁵ U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE PIH 2015-19, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAs) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST IN HOUSING DECISIONS 2-3 (Nov. 2, 2015), <https://www.hud.gov/sites/documents/PIH2015-19.PDF> [<https://perma.cc/C5QG-HLCK>].

¹⁵⁶ *Id.* at 4.

¹⁵⁷ See *Town of Oyster Bay Hous. Auth. v. Garcia*, 70 N.Y.S.3d 816, 816 (N.Y. Dist. Ct. 2018).

¹⁵⁸ *Id.* In another eviction case in New York, the court held that evidence of an arrest off-site for cocaine possession was insufficient evidence to support a hearing officer's finding that the tenant had engaged in criminal activity. See *Rivera v. Town of Huntington Hous. Auth.*, No. 12-CV-901 DRH ARL, 2012 WL 1933767, at *5 (E.D.N.Y. May 29, 2012).

¹⁵⁹ 42 U.S.C. § 12112(d)(2) (2018).

employees,¹⁶⁰ but the information thus gained cannot be used to discriminate against the individual based on disability.¹⁶¹

These medical examinations may reveal evidence of either legal or illegal drug use. After employment, employers may require examinations of employees if the examinations are job-related and consistent with business necessity.¹⁶² At any point in time, employers are permitted to inquire whether employees are capable of performing the essential functions of their jobs.¹⁶³ In addition, any information obtained from permitted medical examinations or inquiries has important protections. The results of any required pre-employment physicals must be kept separate from other employee records and treated as confidential medical records.¹⁶⁴ Any other medical examinations or inquiries also are subject to this requirement.¹⁶⁵ Information may be revealed to the extent necessary for work restrictions or accommodations, however, thus allowing supervisors or managers to be aware of the employee's situation.¹⁶⁶

Despite these restrictions on medical examinations, employers may acquire knowledge of employee drug use in many different ways. Drug tests to determine illegal drug use are not medical examinations under the ADA.¹⁶⁷ As landlords may do with prospective tenants, employers may conduct background checks on prospective employees that could reveal arrest or conviction records for drug use. Employers also are allowed to employ reasonable drug testing policies to ensure that employees are not engaging in illegal drug use.¹⁶⁸ Employees who are identified as recovering from substance abuse may be tested more frequently as well.¹⁶⁹

There is thus a multiplicity of ways for landlords and employers to obtain information about drug use, whether legal or illegal. One way or another, the information will be difficult to hide. Protection against discriminatory use of the information is therefore essential.

V. CONCLUSION: REVERSING THE EXCLUSION OF ILLEGAL SUBSTANCE ABUSE

Reversing the exclusion of illegal substance abuse from the definition of disability would enable individuals with substance abuse disorders who use illegal drugs to claim the protections of the ADA. It would thus put these individuals on a

¹⁶⁰ *Id.* § 12112(d)(3)(A).

¹⁶¹ *Id.* § 12112(d)(3)(C).

¹⁶² *Id.* § 12112(d)(4)(A).

¹⁶³ *Id.* § 12112(d)(4)(B).

¹⁶⁴ *Id.* § 12112(d)(3)(B).

¹⁶⁵ *Id.* § 12112(d)(4)(C).

¹⁶⁶ *Id.* § 12112(d)(3)(B).

¹⁶⁷ 42 U.S.C. § 12114(d)(1) (2018); *see also* E.E.O.C. v. Grane Healthcare Co., No. 3:10-250, 2015 WL 5439052, at *38–39 (W.D. Pa. Sept. 15, 2015) (stating that drug tests are not medical examinations under the ADA).

¹⁶⁸ 42 U.S.C. § 12114(b) (2018).

¹⁶⁹ *See* Buckley v. Consol. Edison Co. of New York, Inc., 155 F.3d 150, 151 (2d Cir. 1998).

par with others with disabilities, rather than refusing to protect them from discrimination because of the character of the drugs that they use. It would reverse the assumption that people with substance abuse disorders that involve them in illegal drug use should be treated as criminals for the purpose of excluding them from any protections of anti-discrimination law.

Reversing the exclusion, however, would not necessarily protect illegal drug use. Rather, it would place the inquiry where it belongs: on whether any adverse action is discriminatory. Landlords could insist that tenants be otherwise qualified. To the extent that engagement in criminal activities is disqualifying for housing or a job, it would continue to be disqualifying—on the basis that these individuals are not qualified for what they seek, not on the basis that they cannot question whether a judgment about whether they are qualified is discriminatory. Whether it is illegal, drug use may be relevant to an individual's ability to perform in certain positions, just as other health conditions may be. Landlords and employers may state qualification standards—but the import of anti-discrimination law is that these standards must be justified as job related and based on business necessity. Landlords and employers also may insist that tenants or employees be qualified for what they seek and, through the direct threat defense, insist that they not pose safety risks. However, bringing these determinations about individual abilities to perform jobs safely within anti-discrimination law will require an individualized inquiry rather than reliance on stereotypes.

Moreover, knowledge of protection against discrimination might help to encourage people to reveal the information that could help them get treatment or be provided with supportive accommodations. Reversing the exclusion of illegal substance abuse from disability anti-discrimination law is a critical aspect of how the law can catch up with the recognition that substance abuse is a disorder.